No. 73-1106

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

On Writ Of Certiorari To The Illinois Appellate Court

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

In view of the extensive brief previously submitted by petitioners (hereinafter called petitioners' principal brief), this reply brief will be limited to the major points raised in the brief filed by respondents.

I.

The Injunctive Orders of the Circuit Court of Cook County Were Barred by the Outstanding Judgment of the Court of Appeals (Which Had Been Stayed But Not Vacated By This Court) in Keane v. National Democratic Party.

In response to petitioners' contention that the injunctive orders of the Circuit Court of Cook County were barred at the time of issuance by the outstanding judgment in *Keane* v. *National Democratic Party* (see pp. 23-48 of petitioners' principal brief), respondents make three arguments: (1) that the Court of Appeals for the District of Columbia had not adjudicated the claim which was the basis of respondents' subsequent state court proceeding (pp. 69-72 of respondents' brief); (2) that "the purpose and result of the stay [issued by this Court on July 7, 1972] was to enable the Illinois court, time permitting, to hear respondents' claim under state law" (pp. 67-69); and (3) that any *res judicata* bar upon the Illinois state court proceedings as a result of the prior adjudication of the issues in respondents' Federal court action "would have been contrary to considerations of comity and federalism expressed in 28 U.S.C. § 2283 and would have totally ignored the opinion of the Court of Appeals for the Seventh Circuit in *Cousins* v. *Wigoda*, 463 F.2d 602 (1972), application for stay denied, 409 U.S. 1201 (1972)" (pp. 68-69). Each of these responses is invalid.

A. The Court of Appeals for the District of Columbia expressly adjudicated, and rejected, respondents' claim that because petitioners had not been selected in accordance with state law, petitioners could not lawfully be seated in the 1972 Democratic National Convention.

In their effort to demonstrate that the Court of Appeals for the District of Columbia had "expressly not decided"

the claim which was the basis of the subsequent state court orders, respondents wrench out of context two statements made by the Court of Appeals.

Respondents' first (at p. 70 of their brief) quote the Court of Appeals as stating:

"No violation of Illinois law is at issue here."

In fact, the Court of Appeals made that statement in the context of considering, *and expressly rejecting,* respondents' contention that because they, and not petitioners, had been elected in accordance with Illinois law, the 1972 National Convention could not seat petitioners in the Convention. The full quotation from the Court of Appeals reads as follows (the portions omitted by respondents are in italics):

> "*The challenged delegates* [respondents] *claim that the Democratic National Party cannot abridge their right under Illinois law to the delegate seats for which they have been elected. The relationship, in this case, between the Illinois law and the Party's regulations offers no grounds for relief to the challenged delegation.* No violation of Illinois law is at issue here. *The Illinois election law is, by itself, not incompatible with guideline C-6 of the McGovern Commission. The guideline compelments the Illinois law in an area—selection of delegate slates—where the state law is silent. The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated a state law in addition to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself.*" (A.-54.)

As the Court of Appeals notes, respondents pleaded and argued in the Federal court the claim which was the basis

of the subsequent state court proceeding. (See also respondents' complaint in the Federal court action quoted at p. 9 of petitioners' principal brief).

Respondents then quote out of context (at p. 70 of their brief) language of the Court of Appeals in which the Court discussed the decision of the District Court not to enjoin proceedings in the Illinois court. In the full quotation, however, the Court of Appeals goes on to *disagree* with the District Judge and to note that its own judgment did involve an adjudication, *and rejection*, of the basis for the state court proceeding. The full quotation from the Court of Appeals reads as follows (portions omitted by respondents are again in italics):

> "Judge Hart based his denial of the counterclaim on the grounds that the question of the legality of the slate certified by the Credentials Committee in lieu of the plaintiffs was not before him, and that there was no justiciable issue presented in this action concerning the eligibility of the members of that slate to represent the Illinois districts in question.
>
> "In so ruling Judge Hart seems to have focused solely on the state law claims which apparently are the basis of the state proceeding, and which were not before the District Court here. *However, in approving the actions of the Credentials Committee in unseating the Illinois plaintiffs and seating an alternative delegation, we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by State law. Proper resolution of the ultimate issues raised in the state proceeding would thus require consideration of both sets of requirements, and the interests of judicial efficiency, coupled with the rapidly expiring time remaining before the start of the Convention, call for resolution of those issues in one forum.*" (A.-57-58.)

The Court of Appeals, in language not quoted by respondents, went on to make even more explicit that it had adjudicated, and rejected, the claim which was the basis for the subsequent state court orders appealed from herein, and the Court of Appeals issued an injunction against continuation of the Illinois proceedings. The Court of Appeals stated:

> "*The Resolution of the Committee which we have here approved provides that the 59 plaintiffs in this suit are not to be seated as the delegates to the Convention from their districts in Illinois. It also provides that 59 other persons shall be seated as the delegates from those districts.* In order to protect *our judgment approving this Resolution,* it is necessary to enjoin plaintiffs from taking any action in any other court that would impair the effectiveness and the integrity of the judgments of this Court.
>
> • • •
>
> "*If plaintiffs were successful in their state proceedings one likely result would be that no delegates from the challenged Illinois districts could be seated at the Convention. Such a result would not just deprive the National Party of the participation of those persons whom it has selected to fill those delegate seats, more fundamentally it would deprive all Democrats residing in those districts of any voice or representation in the process by which their party's candidate for the Presidency is selected.* The immediacy of this injury is clear—the Convention begins in five days—and after that the injury is wholly irreparable.
>
> "We also consider that the unique situation presented by these two cases, all interested parties represented in the federal forum and a critical party missing from the state forum; this court's familiarity with the complex of issues involved—bred and nurtured in the consideration of both the California and Illinois

challenges; both actions commenced in the separate forums by the same class of plaintiffs; and the rapidly expiring time within which any judicial action is possible—amply provide the extraordinary and unusual circumstances that call for equitable relief. For the foregoing reasons we reverse the District Court's denial of the National Party's Counterclaim, and we accordingly enjoin the Illinois plaintiffs from taking action in any other Court that would impair the effectiveness and the integrity of the judgments of this Court." (A.-60-61.) [Emphasis added]

Respondents' effort to show the contrary notwithstanding, there is simply no doubt or question about the fact that the Court of Appeals for the District of Columbia on July 5, 1972 adjudicated, *and rejected,* the precise claim which respondents subsequently asserted as the basis for the injunctive orders of the Circuit Court of Cook County appealed from herein.

B. This Court's stay order of July 7, 1972 did not have "the purpose and result" of enabling an Illinois court to relitigate the issues previously adjudicated in Keane v. National Democratic Party.

Respondents contend (at p. 67 of their brief):

> "In view of the history of the case at bar, the purpose and result of the stay [issued by this Court on July 7, 1972] was to enable the Illinois court, time permitting, to hear respondents' claim under state law."

This contention of respondents, which is critical if they are to justify the subsequent orders of the Circuit Court of Cook County, is directly contrary to (a) explicit and well-established law on the effect of a stay of a Federal judgment and (b) the express language of this Court's *per curiam* opinion of July 7, 1972.

The law is well-established on the effect of a stay of a Federal judgment. Such a stay "suspends execution of the judgment, but not its conclusiveness in other proceedings." 1 B. Moore's Federal Practice § 0.416 (3) at p. 2252. (See cases cited at pp. 28-33 of petitioners' principal brief.) Respondents make no effort to deal with this well-established authority.

Respondents' contention might have more plausibility if there were even a hint in this Court's opinion of July 7, 1972 that it intended its stay order, contrary to the established law, to permit relitigation of the issues in an Illinois state court. On the contrary, however, this Court's opinion of July 7, 1972 stated that this Court was acting in light of the "large public interest in allowing the political processes to function free from judicial supervision." Throughout its opinion this Court emphasized that it was acting to permit the Chicago and California challenges to be decided not by any court but by the National Convention itself, noting that "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." (A.-68.) This Court stated that its stay order "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its credentials committee." (A.-68.)

Respondents state (at p. 73 of their brief) that:

> "There would have been no purpose for this Court's stay if not to permit respondent to proceed in the state court."

This statement wholly ignores this Court's *per curiam* opinion which gave the reasons for the Court's stay of the California and Illinois judgments of the Court of Appeals:

to permit the political processes of the National Convention "to function free from judicial supervision."*

Respondents are in the position of arguing that this Court's stay order had "the purpose and result" of permitting the subsequent Illinois court proceedings although (a) the stay order did not have that effect as a matter of well-established law (which respondents do not attempt to controvert) and (b) this Court stated in its *per curiam* opinion that it was acting to permit the 1972 Democratic National Convention, and not the courts, to decide the Chicago and California contests. Respondents make the extraordinary statement (at p. 75 of their brief) that:

> "It would demean the Supremacy Clause if it were employed to compel a state court to recognize a stayed and subsequently vacated judgment which this court had strongly criticized prior to the time the state's order was issued."

This Court had not, in fact, "strongly criticized" the judgment in the Chicago case but, rather, had indicated tentative agreement with the dismissal of respondents' complaint (although on grounds different from those advanced by the Court of Appeals); in the California case, in contrast, this Court had indicated disagreement with the lower court's decision to grant judicial relief. In any event, however, the supremacy clause does, indeed, compel

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*The dissenting Justices, who favored judicial resolution of the issues on the merits prior to the Convention, were equally clear that the effect of this Court's stay was to allow the National Convention to decide the contests. There is no hint in the opinion of any Justice that "the purpose and result of the stay" was, as respondents contend, to allow an Illinois state court to consider respondents' claims.

a state court to recognize an outstanding Federal court judgment, and neither the fact that the judgment was stayed, nor the fact that it was subsequently vacated, in any way alters that fact.

In the end, the sole basis for respondents' contention that the Illinois court orders were not barred by the prior outstanding Federal judgment seems to lie in the fact that respondents were not *enjoined* from proceeding in the Illinois courts.* Indeed, throughout their brief respondents confuse the question of whether the prior Federal court decisions had the legal effect, as a matter of *res judicata*, of barring subsequent action in the Illinois court with the question of whether respondents were *enjoined* from continuing other court proceedings. Unless respondents were enjoined from proceeding elsewhere, they seem to be saying, the Illinois courts were free to act, notwithstanding the *res judicata* effect of prior decisions. This contention reflects a total misunderstanding of principles of *res judicata* which have nothing to do with whether proceedings have been *enjoined* by another court. It is only in the most unusual circumstances that a Federal court will enjoin pending state proceedings (see, *e.g.*, *Cousins* v. *Wigoda*, 409 U.S. 1201 (1972) (opinion of Mr. Justice Rehnquist, in Chambers)). The absence of such an injunction does not in any way indicate that the orders appealed from herein were not barred, as a matter of *res judicata*, by the prior Federal judgment.

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*The Court of Appeals had enjoined the Illinois proceedings on July 5, 1972. However, this Court's stay order, as construed by the Court of Appeals, had the effect of staying that injunction. See respondents' brief, Appendix E at A.-17.

C. The decision of the Court of Appeals for the Seventh Circuit in Cousins v. Wigoda, 463 F.2d 602, application for stay denied, 409 U.S. 1201 (1972), and considerations of comity and federalism, in no way supported relitigation of the issues in an Illinois state court after a judgment on the merits, adverse to respondents, had been entered in the Court of Appeals for the District of Columbia.

Respondents contend (at p. 68 of their brief):

> "To have barred the state court in the instant case would have been contrary to considerations of comity and federalism expressed in 28 U.S.C. § 2283 and would have totally ignored the opinion of the Court of Appeals for the Seventh Circuit in *Cousins* v. *Wigoda*, 463 F.2d 602 (1972), *application for stay denied*, 409 U.S. 1201 (1972), mandating to the Illinois state court questions under state law concerning delegate selection."

In fact, the decision of the Court of Appeals for the Seventh Circuit, and Mr. Justice Rehnquist's subsequent denial of an application for stay of that decision, were rendered *prior* to the adjudication on the merits in the Federal court proceedings commenced by respondents on July 3, 1972. The issue in the earlier Seventh Circuit case was whether, prior to any decision on the merits in any court, respondents' state court action could be enjoined by a Federal court on the ground that respondents' effort to bar participation by petitioners in the political process was so flagrantly invalid and frivolous as to amount to harassment and interference with First Amendment rights justifying a Federal injunction (see p. 15 of petitioners' principal brief). A Federal District Court in Chicago so held. The Court of Appeals for the Seventh Circuit (in a 2-1 decision) reversed, noting, among other things, that

"the partial stay of the state proceedings cannot be justified by mere speculation that an Illinois Chancellor might commit flagrant error." 463 F.2d 600, 608 (7th Cir. 1972).* Mr. Justice Rehnquist, citing principles of Federal-state comity and his limited authority as a single Justice, declined to stay the judgment of the Court of Appeals. 409 U.S. 1201 (1972).

Those prior decisions on the propriety of a Federal injunction against respondents' state court proceeding, prior to any adjudication on the merits, have no bearing upon the question of the *res judicata* effect of the judgment on the merits entered by the Court of Appeals for the District of Columbia on July 5, 1972. There is no basis whatsoever for respondents' contention (at p. 72 of their brief) that "*Cousins*, which specifically authorized Wigoda to proceed in the state court, and not *Keane*, is the controlling prior judgment."**

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*Contrary to respondents' intimations, the Seventh Circuit in no sense indicated any agreement with the proposition that the state court might *enjoin* participation by petitioners in the Convention. The Seventh Circuit held that an injunction against the state proceedings was improper under doctrines of comity "assuming without deciding that the state complaint contains a frivolous and overly broad prayer for relief which, if granted *in haec verba*, would impair the First Amendment rights of Cousins, et al." 463 F.2d at 608.

** At one point (p. 70 of their brief), respondents suggest that the decision of the Court of Appeals for the District of Columbia did not have *res judicata* effect because the Court acted "without hearing any evidence," particularly as to the manner in which petitioners were selected. As indicated in the earlier quotations, the Court of Appeals held that it was unnecessary to hear evidence as to whether petitioners had been selected in accordance with state law because, conceding that petitioners were selected *contrary* to state law, the National Convention could impose requirements "separate from and in addition to those imposed by state law." (A.-58.)

D. Respondents totally ignore the decision of the Court of Appeals for the District of Columbia on February 16, 1973, on remand from this Court, reaffirming the dismissal of respondents' complaint and stating that the 1972 Democratic National Convention "acting within its competence" seated petitioners in the Convention.

As set forth in petitioners' principal brief (at p. 13), on February 13, 1973, the Court of Appeals for the District of Columbia, on remand from this Court, reaffirmed the dismissal of respondents' complaint against the seating of petitioners in the 1972 Democratic National Convention. The Court of Appeals stated that the 1972 National Convention "acting within its competence" seated petitioners as the Chicago delegates and that respondents' complaint "thus became and is now moot." 475 F.2d 1287, 1288.

Respondents sought to have the Court of Appeals vacate the prior judgment dismissing their complaint, but the Court of Appeals refused to do so and instead, the Court of Appeals affirmed again the judgment dismissing respondents' complaint (see p. 13 of petitioners' principal brief). That action of the Court of Appeals clearly preserved, even after February 16, 1973, the *res judicata* effect of that judgment of dismissal. See *United States* v. *Munsingwear*, 340 U.S. 36 (1950), discussed at pp. 37-38 of petitioners' principal brief. Respondents make no effort in their brief to distinguish this clear authority on the effect of the Court of Appeals' action.

II.

The Action of the Illinois Court in Purporting to Enjoin Petitioners from Participating as Delegates in the 1972 Democratic National Convention Is Without Precedent and Contrary to the Historical and Constitutionally Protected Freedom of Citizens to Engage in National Political Party Affairs.

Respondents' brief highlights the unprecedented character of the injunctions issued by the Illinois court. Respon-

dents cite no case in the 150-year history of National Party Conventions in which any court, state or Federal, has ever before purported to *enjoin* anyone from participating in such a Convention. Nor do respondents cite any authority for the proposition of the Illinois Appellate Court that state law "exclusively governs" the granting of credentials to National Party Conventions, thereby justifying such an injunction.

If the Illinois Appellate Court is correct that state law "exclusively governs," then the historical right of the National Parties to grant credentials to delegates to their conventions, on the basis of their own national rules, standards and principles, is abrogated. In the California, Illinois and Missisippi contests at the 1972 Democratic Convention, for example, only the persons chosen in accordance with the state law, and not their challengers, could lawfully have been seated in the National Convention—regardless of the decisions made by the assembled delegates to the National Convention as to whom they regarded as the National Party's legitimate representatives from those states.

The right of citizens of any state to challenge and replace proposed delegates to a National Convention who have engaged, as respondents were found to have done, in "covert, calculated and deliberate" violation of National Party rules and principles is basic to the free political activity of National Political Parties. When such challenges are made, as this Court stated in *Keane*, "it has been understood since our national political parties first came into being as voluntary associations of individuals that *the convention itself* is the proper forum for determining intra-party disputes as to which delegates shall be seated." (A.-67) [Emphasis added]

In both 1964 and 1968, for example, the Democratic National Convention refused on "loyalty" grounds to seat delegates elected in accordance with Alabama law. Respondents suggest (at pp. 64 66 of their brief) that the "loyalty issue" would somehow be distinct as a legal matter from other types of national rules and principles. How this could be so is mystifying unless we are to have a situation in which the courts of the 50 states will each weigh the National Party interests at stake and decide whether they are "sufficient" to justify a National Party's decision on any particular credentials contest. In any event, it is difficult to see how there could be any more dramatic instance of disloyalty to the National Party than the "deliberate, covert and calculated" violations of National Party Rules by respondents which the National Democratic Party found to have taken place in 1972 (see the Hearing Examiner's Report at A.-22).

As another example, at the 1912 Republican Convention delegates elected in accordance with California law were rejected and challengers seated. Respondents (at p. 63 of their brief) say that this was an improper, "political" outcome. They contrast it with the action of the 1912 Democratic National Convention which decided to reject (by a vote of 639½ to 437) a challenge to delegates elected in accordance with South Dakota law. But it is irrelevant that respondents disapprove of the result in the 1912 California contest at the Republican Convention and approve of the result in the South Dakota contest at the 1912 Democratic Convention. The point is that both parties exercised their right to decide these contests and grant credentials to their Conventions on the basis of their own National Party rules and principles, political commitments, and the other circumstances of such contests, involving, as this Court noted in *Keane*, "relationships of great delicacy and essentially political in nature." (A.-69.)

Moreover, it is difficult to see any basis on which the holding of the Illinois Appellate Court could be limited to states which have established a direct election process for the selection of National Convention delegates. For example, in Mississippi in both 1968 and 1972 a set of delegates was chosen in accordance with a process under state law which involved the initial election of delegates to county conventions who in turn chose delegates to a statewide convention, which then chose National Convention delegates. If state law "exclusively governs" the granting of credentials to National Convention delegates, then a Mississippi state court could have enjoined participation in the Democratic National Convention of the challenging delegations which were actually seated. This point was made explicitly by the National Democratic Party in its brief to this Court prior to the 1972 Convention:

> "Plaintiff [respondents] contends that the right to judge delegate credentials can be totally abrogated by state primary laws. Such an argument is broad indeed. It would mean that as to the approximately half the states with primary laws, the national party may not as a practical matter enforce any rules binding on the state parties. It would mean that where delegates have been elected by a primary, the national party must seat those delegates even if they were nominated by procedures that flagrantly excluded blacks, other minority groups, women, or other persons on a discriminatory basis. It would mean that such delegations would have to be seated even if the nominating procedures excluded the vast majority of rank-and-file party members. It would mean they had to be seated even if they were elected by cross-over voters from another party, who openly stated that they were attending the convention only to sabotage the party. . . .

> "Moreover, the logic of plaintiff's argument would carry far beyond primaries. A well-conducted state convention can produce results as democratic as those produced by a primary. If it violates the rights of primary voters to challenge credentials of delegates, to do so would equally violate the rights of those who elected delegates to a state convention. And thus the effect of plaintiff's argument would be to eliminate the credentials challenge procedure entirely, after nearly a century and a half of unchallenged use, and turn the national party into a helpless organism unable to enforce any fairness, standards or ideological tenets on the state groups which take its name." Brief of National Democratic Party to this Court in *Keane* v. *National Democratic Party*, Appendix C at 32-33.

Respondents attempt to distinguish the Mississippi challenges on the ground that "the challengers alleged and proved systematic, invidious discrimination against black participation in the Democratic party of the state" (respondents' brief at p. 58). Again, even if one could accept the notion that it is possible to somehow pick and choose as a legal matter among different possible grounds of credentials challenge, this distinction would be invalid because the Hearing Examiner whose report on the 1972 Chicago challenge was adopted by the Convention found "substantial and invidious discrimination" (A.-38.) by the Chicago Democratic party against racial minorities, women and young people.

In Georgia in 1952, the Republican National Convention —in a decision which respondents wholly ignore—seated a contesting Eisenhower delegation in the face of an express judgment of a state court of Georgia that the Taft delegation was the "lawful Republican party in Georgia" (petitioners' principal brief at pp. 58-60). Respondents' effort to deny that the National Parties have expressly as-

serted their right to decide contests and grant credentials to delegates regardless of state law is wholly controverted by the comments made by the majority spokesmen in that debate. *E.g.*, Remarks of Gordon X. Richmond of California:

> "I believe that this national convention is absolutely the last authority, the Supreme Court in deciding who shall have credentials to this convention, and it shall not be dictated to by the state court of Georgia or by any other court." 1952 Republican Proceedings at p. 168.*

Petitioners submit that it is clear that both National Parties have asserted and have exercised as a central feature of their free political activity the right to decide contests and grant credentials to delegates to their National Conventions, regardless of whether those delegates have been selected in accordance with a state law. The holding of the Illinois Appellate Court that state law "exclusively governs" in such cases would radically alter the historically exercised and, petitioners submit, constitutionally mandated freedom of citizens to engage in National Political Party affairs.

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* Respondents attempt to undermine the similar remarks of Judge Daniel Hastings at the 1928 Republican Convention by noting (at p. 60 of their brief) that he was speaking for a minority report. As noted in petitioners' principal brief (at p. 58), however, Mrs. Mabel Walker Willebrandt, the chairman of the Credentials Committee, immediately agreed with Judge Hastings that "the Republican national convention makes its own laws." The further remarks of Mrs. Willebrandt (quoted by respondents at pp. 60-61 of their brief) are directed to demonstrating that under the circumstances of the contest there was no conflict between the result under the rules of the National Republican Party and the Texas state law.

III.

The Right of the State of Illinois to Conduct Its Own Electoral Processes Is Not at Issue in This Case; Rather, the Question Is Whether a State May Declare That Its Law Is "Exclusive" and Bar the Application of National Rules and Principles Established By a Political Party to Govern the Granting of Credentials to Its National Party Convention.

A major portion of respondents' brief (pp. 23-55) is devoted to the proposition that the actions of petitioners, the Democratic Party's Credentials Committee and the 1972 Democratic National Convention somehow interfered with Illinois' right to conduct primary elections.

However, it was the *pre-primary* slating and other electioneering activities of respondents, including racial discrimination and closed and secret slate-making, which petitioners contested and which the Hearing Examiner, the Credentials Committee, and, ultimately, the Democratic National Convention found to have violated the rules of the National Democratic Party. Respondents' argument is thus reduced to the proposition that, so long as an election takes place, the National Democratic Party is wholly without power to enforce any rules or principles governing the pre-primary or other activities of potential delegates to its National Convention.*

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* "Though duly elected in district primaries, these delegates [respondents] had been slated, which is to say, selected as nominees with party endorsement, by procedures that were effectively proof against insurgency, or against participation by outsiders, as insurgency is now called. . . . Their [respondents'] chief argument was that election cures all. It is, in their view, a kind of absolution. But the delegate-selection requirements, unlike some more demanding precept systems, do not provide for absolution, by election or otherwise." A. Bickel, "Will the Democrats Survive Miami?" 167 *New Republic* 17, 18 (July 15, 1972).

The result urged by respondents would be inconsistent with the principles expounded by this Court in such cases as *Smith* v. *Allwright,* 321 U.S. 649 (1944), and *Terry* v. *Adams,* 345 U.S. 461 (1953). In both cases, the Democratic Party engaged in pre-election activities which were found by this Court to have violated the constitutional rights of blacks. The mere fact that an election was interposed subsequent to the actions of the Party was held by this Court to be insufficient to insulate the constitutionally-forbidden activities of the Party from scrutiny. The instant case is directly analogous. As the National Democratic Party stated prior to the 1972 Convention:

> "Just as a state may protect its interest in the proper conduct of its elections by narrowly and precisely drawn rules, so the National Democratic Party may use its credentials challenge procedure to protect its interest in ensuring that the procedures by which national convention delegates are selected faithfully reflect the views of all interested party members. If plaintiff or others of his slate [respondents] are denied seats at the Democratic National Convention, it will be because the group calling itself the Democratic Party of Illinois did not follow the rules of the National Party and did not give party members in Illinois a full and meaningful opportunity to have their voices heard at all critical stages of the delegate-selection process. If, as the Hearing Officer found, the steps leading up to the actual election had the effect of improperly distorting the choices presented to the voters, then the vote itself is not entitled to be regarded as sacrosanct by the party. The right to vote has little meaning if the vast majority of voters are excluded from the crucial stages leading up to the election. That is the teaching of *Smith* v. *Allwright, supra,* and *Terry* v. *Adams, supra.*" Brief of National Democratic Party to this Court in *Keane* v. *National Democratic Party,* Appendix C at 34-35.

Decisions of this Court such as *Storer* v. *Brown*, 415 U.S. 724 (1974) and *American Party of Texas* v. *White*, 415 U.S. 767 (1974) (cited by respondents at pp. 25-26 of their brief), which establish a state's right to regulate and restrict, within constitutional limits, access to its election ballot, do not address at all the interests involved in the political processes of a National Party Convention and give no support to the decision of the Illinois Appellate Court in this case. There is nothing in those decisions which suggests that a state may declare that its own electoral laws are "exclusive" in relation to the political processes of a National Political Party, thereby denying to citizens the right to assert through such national political processes the rules and principles established by a National Political Party to govern the granting of credentials to its National Conventions.

IV.

The State of Illinois Had No "Compelling Interest" Which Justified the Injunction Against Petitioners' Participation in the 1972 Democratic National Convention.

Respondents contend throughout their brief that the injunctions against petitioners were justified by a "compelling state interest" in "protecting the integrity of the Illinois electoral process." (pp. 23-35.) What respondents describe as an action by the State of Illinois "to protect the integrity of its electoral process," however, is an injunction which had the practical effect of either (a) requiring the National Democratic Convention to seat as delegates persons who had been found to have deliberately violated National Party Rules against discrimination and against closed and secret slatemaking or (b) preventing the seating of any delegates from the Chicago districts in the 1972 Democratic National Convention.

As discussed above, the rules of the National Democratic Party (upon which petitioners based their challenge) were not in themselves inconsistent with the Illinois state law. Rather, they were designed to supplement the Illinois law in relation to matters—particularly pre-primary slating activities—deemed by the National Democratic Party, after an extensive rule-making process, to be of special importance to achieving full participation in the delegate selection process. As the Court of Appeals for the District of Columbia stated when respondents' claims were before it:

> "The process by which candidates for an office are endorsed can be just as integral a part of the ultimate election as is the election itself. The Supreme Court established that principle in Terry v. Adams, 345 U.S. 461 (1953), and it applies as well with respect to the process for choosing convention delegates. *The Democratic National Party determined to make participation in the nomination process as democratic as possible. This exercise of the Party's power over the qualifications of the delegates to its convention was pursuant to a reasonable regulation calculated to achieve a permissible, indeed laudable, end.*" (A.-53-54.) [Emphasis added.]

Ultimately, the only way citizens of any state have to enforce National Political Party rules and principles is to contest the seating of delegates who have violated those principles. In this case the National Democratic Party determined, after an extensive hearing and debate in the Credentials Committee and the Convention, to uphold petitioners' challenge on that ground. Under the decision of the Illinois Appellate Court, however, the Convention "lacked power or authority" to deny respondents their seats in the Convention. Respondents defend this result by saying that it was based upon a "compelling state in-

terest." But the State of Illinois clearly has no legitimate and compelling state interest in preventing enforcement of National Party Rules against racial discrimination or against closed and secret slatemaking by local party officials. The most that can be said of the Illinois court decision is that the court would have balanced the interest of the National Party in enforcing those rules and principles against the other interests involved in the contest, including the results of the primary election—which was, of course, at the heart of the political debate over how to resolve the contest—and would have come out differently. But this is clearly a matter of policy to be decided by the National Party.* Disagreement with the results of the National Party's decision does not represent a "compelling state interest" which can justify an injunction of the type issued in this case.

The alternative result of the Illinois court injunction was that the Convention would seat no one to represent the Chicago districts. Respondents state (at p. 46 of their brief) that "this result would be preferable" to the seating of petitioners. From the standpoint of respondents' own political intereststs, that judgment may be understandable. But it is difficult to see what "compelling state interest" of the State of Illinois would have been served by depriving Chicago of any representation in the 1972 Democratic National Convention. This is precisely the situation

* It should be noted that the balancing of interests involved could be, and was, argued to support various compromise results. As noted in petitioners' principal brief, a last-minute motion was made in the National Convention to split the delegation 50-50 between the two competing factions.

discussed by the Federal District Court in *Riddel* v. *National Democratic Party* (a decision never mentioned by respondents). After that court had determined that the "regular" Mississippi delegation had been selected in accordance with Mississippi law, and the challengers had not, the court was asked to enjoin participation by the challengers in the 1972 Democratic National Convention. The court denied that relief stating:

> "Part of the relief requested here is to enjoin the so-called 'Loyalists' from participating in the National Democratic Convention, but to do so would serve no plausible purpose. To do so would prohibit each and every democrat in Mississippi from having a voice in the selection of a candidate for President and Vice-President of the United States to run as a National Democrat.
>
> "To refrain from enjoining the Loyalists would at least grant each and every Democrat in Mississippi the privilege or right to speak through some group to the National Convention. The group selected might not voice the opinion of the majority of the electorate of Mississippi, but if not, that is the selection of the national organization, and the national organization takes its political risk—whether the potential stakes are good, bad—or just political." 344 F. Supp. at 923.

Respondents seek throughout their brief (see pp. 17-21; 46) to focus attention on the composition of the alternative Chicago delegation (petitioners) which the National Democratic Party decided to seat in its 1972 Convention. Respondents attach as an appendix to their brief (Appendix D) an article by Mike Royko, a Chicago newspaper columnist, in which he criticizes the challenge delegation for lacking sufficient "white ethnic" representation. What legal significance is thought to attach to the Royko article or to respondents' other particular objections to the chal-

lenge delegation is obscure. It has never been disputed that petitioners (like the 1972 California and Mississippi challenge delegations and, indeed, like virtually every other challenge delegation in the history of credentials contests) were not chosen in accordance with state law.

The Royko article does, however, suggest the flavor of the political debate in 1972 over which Chicago delegation should be seated. Respondents circulated thousands of copies of the Royko article among the delegates to the Miami Convention and made the same point in argument before the Credentials Committee and the Convention. Petitioners, on the other hand, also distributed copies of articles and editorials, which were exhibits to petitioners' briefs before the Democratic Credentials Committee, supporting their charges that respondents had attempted by mob action and violence to disrupt the caucuses called by the challengers to choose an alternative Chicago delegation.*

Petitioners argued that they, and not respondents, were the loyal Chicago Democrats committed to non-discrimination and other National Democratic Party principles and opposed to the kind of closed and discriminatory practices which they alleged (and the Hearing Examiner found) to be characteristic of respondents. The alternative delegation included Chicago civil rights leaders (such as Albert Raby and Rev. Jesse L. Jackson), Chicago aldermen, members of the Illinois Governor's staff, state legislators, leaders of local community groups and others, all of whom were persons who had *not* violated the rules and

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* See Appendix I to this Reply Brief: "Chicago's Own Stormtroopers," Chicago Today (June 25, 1972); Appendix II: "Muscle Politics," Chicago Sun-Times (June 24, 1972); and Appendix III: "Daley's People Make A Point," Chicago Daily News (June 24, 1972).

principles of the National Democratic Party (see p. 8 of petitioners' principal brief). In addition to the Party's announced rules and principles, of course, the delegates to the National Convention were faced with arguments concerning the National Democratic Party's own political interests, both immediate and long-term, in resolving the contest and both factions argued that they represented the best future for the Democratic Party in Chicago. Various compromise solutions, such as splitting the delegation between the two factions (as had been done in many past credentials contests), were widely discussed.

Respondents may believe that "it would be preferable" if the National Democratic Party had seated no one to represent Chicago in its 1972 Convention. But petitioners submit that no court, in Illinois or elsewhere, sits to pass such a judgment upon the wisdom of a decision made by the National Democratic Party or any other political party on this or any other credentials contest. Except possibly in extraordinary circumstances (such as deliberate racial discrimination) clearly not present in this case, the citizens who choose to associate together in a National Political Party have the right to make such decisions for themselves.

V.

No Violation of the Constitutional Rights of Respondents Is Involved in This Case.

Respondents devote a substantial portion of their brief (pp. 23-33) to the general proposition that this case involves a Federally-protected "right to vote."* This claim

*Although respondents emphasize the "right to vote," this case was *not* brought on behalf of any voters. Rather, the complaint was filed solely on behalf of the "challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention" from Chicago (A.-1-2).

is extraordinary, particularly in view of the fact (discussed at pp. 89-90 of petitioners' principal brief), that respondents have previously argued vigorously that their complaint did not raise *any* Federal questions.

When respondents' complaint was filed in the Circuit Court of Cook County, petitioners sought to remove the case to the Federal District Court for the Northern District of Illinois on the ground that a Federal question was presented therein. Respondents successfully obtained a remand order to the state court on the ground that any Federal constitutional issues presented in the case arose solely in defense. Respondents' motion for remand to the state court stated that "[p]laintiff's action was commenced in the Circuit Court of Cook County for a declaration of rights and injunctive relief under state statutes. . . . No federal question is presented by the complaint." Motion for Remand, p. 2, filed April 24, 1972 in *Cousins* v. *Wigoda*, 342 F. Supp. 82 (N.D. Ill. 1972).

As noted in petitioners' principal brief, Federal District Judge Hubert L. Will, in remanding the case to the state court, stated that the controversy should be decided by the National Convention and not the courts and, further, that "it is difficult to imagine any thoughful court granting the type of relief requested" [an injunction against petitioners]. (A.-16.) Whatever view is taken of these comments of Judge Will on the merits of respondents' complaint (which respondents describe, at p. 7 of their brief, as "gratuitous"), it is clear that Judge Will's opinion constituted a holding on the merits, affirmed by the Court of Appeals for the Seventh Circuit, that respondents'

complaint did not raise a Federal question.* The holding that the complaint does *not* raise a Federal question is clearly the law of this case. See, *e.g., Insurance Group Committee* v. *Denver & R.G.W.R. Co.,* 329 U.S. 607, 612 (1947); *Messinger* v. *Anderson,* 225 U.S. 436, 444 (1912). See also *United States* v. *United States Smelting, R. & M. Co.,* 339 U.S. 186, 198 (1950).

Setting aside that preliminary matter, neither respondents nor the Illinois Appellate Court set forth any theory on the basis of which the actions of petitioners—or even the actions of the National Democratic Party (which, it should be noted, has never been a party to this action)—might be deemed to constitute "state action" within the meaning of the Fourteenth Amendment. Indeed, respondents state (at p. 47 of their brief):

> "In the context of the instant case it is not necessary to determine whether the Convention action is 'state' action within the meaning of the Fourteenth Amendment."

Nevertheless, respondents cite a panoply of cases (at pp. 25-34 of their brief) dealing with Federal constitutional rights in the electoral context, all of which depend upon the basic premise that "state action" is involved. In the absence of "state action"—and it is difficult to see any basis upon which the activities of petitioners, a group of private citizens, could be so regarded (see pp. 90-91 of

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* The Court of Appeals affirmed the remand order *per curiam* (No. 72-1384, 7th Cir., June 30, 1972), stating that "the reasoning and result set forth in the memorandum opinion of the district court is now adopted as the opinion of this Court and the order of the district court is affirmed. . . ." The Court of Appeals added the notation that "[w]e express no opinion as to the effect of state law on the determination of proper delegates to the Convention."

petitioners' principal brief)—the cases cited by respondents simply are not applicable.

Setting aside the critical issue of "state action" as well, petitioners submit that respondents offer no plausible rationale for the proposition that the actions of the National Democratic Party in seating petitioners in the Convention were unconstitutional. Respondents apparently do not seek to resurrect their claim (rejected by the Court of Appeals for the District of Columbia) that the National Party Rules involved in this case were unconstitutional. (A.-51-57.) Nor do they seek to defend the contentions of the Illinois Appellate Court that the Hearing Examiner's Report and the other procedures of the National Democratic Party in relation to the Chicago contest violated "due process."

In the end, all that respondents' "constitutional" claim amounts to—assuming their complaint had raised Federal issues and assuming "state action" were demonstrated—is a reassertion of the proposition that the Illinois electoral law "exclusively governed" the granting of credentials to Illinois convention delegates.

VI.

The Injunctive Relief Granted By the Circuit Court of Cook County Constituted an Impermissible Prior Restraint Upon the Freedom of Association of Petitioners.

Respondents in their brief fail to address themselves to the nature of the drastic, last-minute, and wholly unprecedented relief granted by the Circuit Court of Cook County—namely, an *injunction* against petitioners' participation in the Democratic National Convention as delegates from Chicago even if the Convention should decide, as it ultimately did, that petitioners were entitled to be seated.

As noted in petitioners' principal brief (at pp. 71, 76) declaratory relief as to which of two contesting National Convention delegations was chosen in accordance with state law is not totally without precedent. See, e.g., *Riddell* v. *National Democratic Party*, 344 F. Supp. 908, 923 (S.D. Miss. 1972) (appeal pending, No. 72-2437, 5th Cir.). Petitioners do not suggest that any judicial relief was appropriate in this case, but if granted by the Illinois state courts, declaratory relief would have had a vastly less drastic impact upon the First Amendment rights of petitioners and of the National Democratic Party assembled in Convention. As Mr. Justice Marshall noted in *Keane*, "A declaratory judgment is a milder remedy than an injunction. . . ." 409 U.S. 1, 10 (1972) (dissenting opinion on application for stay). See also *Perez* v. *Ledesma*, 401 U.S. 82, 111 (1971) (separate opinion of Brennan, J.).

The injunctive relief granted by the Circuit Court of Cook County, issued immediately before the Convention opened, but prior to the time that the Convention had taken any action with respect to the Chicago challenge, constituted a type of prior restraint upon the exercise of First Amendment freedoms, including the freedom of association, which has been repeatedly condemned by this Court (see p. 71 of petitioners' principal brief). The effect of the purported restraint would have been to require petitioners to forego irrevocably their right to participate in the Convention in accordance with the decision of the assembled delegates. Thus, unlike other prior restraint cases decided by this court (*e.g. New York Times Co.* v. *United States*, 403 U.S. 713 (1971)), the restraint imposed by the injunction granted in the instant case would not merely have delayed for an indeterminate period the exercise of First Amendment rights, but rather would have

totally abrogated those rights. As Mr. Justice Harlan noted in *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 163 (1968) (concurring opinion):

> "[T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."

Accord, *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968).

It has been well-established, at least since the decision of this Court in *Near* v. *Minnesota*, 283 U.S. 697 (1931), that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971), and cases cited therein. In *Carroll* v. *Commissioners of Princess Anne*, *supra*, which involved "a rally and 'political' speech in which the element of timeliness may be important" (393 U.S. at 182), this Court refused to sanction even a ten-day restraining order that merely would have delayed the holding of the political meeting that was enjoined. In the instant case, as noted, the injunctive relief granted by the Circuit Court of Cook County would not simply have delayed the exercise by petitioners of their constitutional rights; the injunction would have totally abrogated those rights.

If this Court should uphold the granting of such injunctive relief, then it is predictable that in virtually all future credentials contests there will be resort to the state courts for judicial relief. The brief of amici curiae notes (at pp. 35-36), for example, that the application of the National Democratic Party's "proportional representation" principle (adopted in 1972 to apply to future Conventions) is one likely source of future litigation; but

there will also be many others, in every party. On the eve of the National Convention, as the delegates assemble and political contests are at their most intense, it would be within the power of a state court to attempt to dictate the outcome of those political processes by issuing injunctions against participation in the National Convention. Petitioners submit that this kind of prior judicial restraint upon freedom of association is contrary to fundamental First Amendment principles and the injunctions issued by the Illinois court should be reversed for that reason alone.

CONCLUSION

For the reasons set forth in petitioners' principal brief and herein, petitioners respectfully pray that the judgment of the Illinois Appellate Court be reversed.

Respectfully submitted,

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